

12/20/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 48  
CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Supplemental Restraint Specialists, Inc.  
v.  
Safety Restraint Systems, Inc.

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Opposition No. 107,476  
to Application No. 75/041,691  
filed on January 11, 1996  
and  
Cancellation No. 26,722

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Elizabeth L. Swanson, Esq. for Supplemental Restraint  
Specialists, Inc.

Joseph F. Schmidt and Brian J. Lum of Laff, Whitesel,  
Conte & Saret for Safety Restraint Systems, Inc.

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Before Simms, Seeherman and Walters, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Supplemental Restraint Specialists, Inc. (plaintiff)  
filed its opposition to the application of Safety  
Restraint Systems, Inc. (defendant) to register the mark  
shown below on the Principal Register for "installing  
airbags and airbag sensors in automobiles in which the  
previous airbags have been deployed," in International

Class 37.<sup>1</sup> The application includes a disclaimer of SRS SAFETY RESTRAINT SYSTEMS INC. apart from the mark as a whole.

Plaintiff also filed a petition to cancel defendant's registration of the mark shown below on the Supplemental Register for "installing airbags and airbag sensors in automobiles in which the previous airbags have been deployed," in International Class 37.<sup>2</sup> The registration includes a disclaimer of exclusive rights to use the letters SRS apart from the mark as shown.

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<sup>1</sup> Application Serial No. 75/041,691, filed on the Principal Register January 11, 1996, based upon a Canadian registration and alleging priority based upon the Canadian application filing date of July 12, 1995. Plaintiff points out that this application was amended to the Supplemental Register. However, the application was amended back to the Principal Register by Examiner's Amendment of April 28, 1997.



<sup>2</sup> Registration No. 2,068,125, issued on the Supplemental Register on June 3, 1997, based on a claim of priority and a Canadian registration, under Section 44.



As grounds for both the opposition and the petition to cancel, plaintiff asserts that defendant's marks, when applied to defendant's services, so resemble plaintiff's previously used mark SUPPLEMENTAL RESTRAINT SPECIALISTS, and its previously used design mark incorporating SRS and SUPPLEMENTAL RESTRAINT SPECIALISTS, INC., shown below, for the "service and installation of automobile airbag parts"<sup>3</sup> as to be likely to cause confusion, under Section 2(d) of the Trademark Act.<sup>4</sup>

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<sup>3</sup> Plaintiff has filed application Serial No. 75/249,910 for the mark SRS SUPPLEMENTAL RESTRAINT SPECIALISTS, INC. and application Serial No. 75/249,910 for the mark SUPPLEMENTAL RESTRAINT SPECIALISTS, each for services identified as "mobile reinstallation of automobile airbag parts."

<sup>4</sup> For the first time in its brief, plaintiff has argued that defendant's marks are merely descriptive; and that defendant has not established that its marks have acquired distinctiveness. Claims of mere descriptiveness and lack of acquired distinctiveness are not relevant to a mark registered on the Supplemental Register. With respect to the opposed application, these issues were not pleaded, tried or established. We have given these arguments no consideration.

Similarly, defendant has not argued that plaintiff's marks are not inherently distinctive, nor was the issue tried by the parties. We note the statement by the Federal Circuit, our primary reviewing court, in *Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (1990), that "a petitioner in a trademark cancellation proceeding who alleges likelihood of confusion under section 2(d) of the Lanham Act (15 U.S.C. @ 1052(d) (1988)) must establish that the term he claims to be his mark is distinctive of his goods, whether inherently or through the acquisition of secondary meaning." However, in *Towers*, the parties raised and tried before the Board the issue of whether petitioner's mark was inherently distinctive. In the case before us, on the other hand, the trial record clearly indicates that the parties shared the assumption that, except for defendant's mark on the Supplemental Register, the marks involved herein are inherently distinctive. Thus, in reaching our decision, we have considered plaintiff's mark and the mark in defendant's pending application to be inherently distinctive.



Defendant, in its answer in each proceeding, denied the salient allegations of the claim. The opposition and cancellation proceedings have been consolidated and are considered together in this opinion.

*Procedural Matters*

As a preliminary matter we address the fact that several of the testimony depositions, exhibits and briefs have been submitted as "Confidential." In this regard, we note the relevant provisions of Trademark Rule 2.125(e), 37 CFR §2.125(e):

Upon motion by any party, for good cause, the Trademark Trial and Appeal Board may order that any part of a deposition transcript or any exhibits that directly disclose any trade secret or other confidential research, development, or commercial information may be filed under seal and kept confidential under the provisions of §2.27(e).

However, as noted in the Board's order of June 10, 1999, neither plaintiff nor defendant has requested a protective order with respect to such materials, nor have the parties filed a stipulated protective order. Moreover, only those portions of filings which are truly

confidential in nature should be filed under seal as confidential.

Therefore, within thirty days of the date of this decision, the parties must resubmit their respective materials designated as "confidential" by placing them in a separate envelope clearly designated as confidential, with those portions which are not confidential being submitted in the normal manner; moreover, only those pages which truly contain confidential material should be submitted as such.<sup>5</sup> In connection therewith, plaintiff or defendant is directed to prepare a protective order, preferably upon terms mutually agreeable to the other party, for the Board's consideration, including an explanation of why those portions submitted under seal are deemed to be confidential in nature. We will keep the materials that are presently stamped "confidential" under seal until we decide the motion upon resubmission. If no resubmission is made within the specified period, we will treat both parties' entire submissions as part of the public record.

We consider, next, defendant's August 17, 1999 motion to strike plaintiff's exhibits nos. 79-87. The

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<sup>5</sup> To the extent possible, the Board encourages plaintiff to redact confidential information from its exhibits.

Board, in its order of February 22, 2000, deferred decision on defendant's motion until final decision, so we consider this motion now. Defendant contends that these exhibits are inadmissible because they were submitted during plaintiff's rebuttal period<sup>6</sup> by notice of reliance and they are not printed publications or official records which may be submitted by notice of reliance; and that the exhibits were not previously produced or identified in response to defendant's discovery requests.

While it is clear from the record that the exhibits were submitted by notice of reliance<sup>7</sup> on July 31, 1999 during plaintiff's rebuttal testimony period, it is not necessary for us to consider whether or not such evidence is properly the subject of a notice of reliance or whether the unsigned notice of reliance is valid.<sup>8</sup> The same exhibits (nos. 79-87) were also submitted with the July 30, 1999 rebuttal testimony of Bruce Strain, and properly introduced in connection therewith.

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<sup>6</sup> This objection is not based on any allegation that the matter submitted is not proper for rebuttal.

<sup>7</sup> In its order of September 30, 1999, the Board noted that plaintiff's notice of reliance was unsigned and directed plaintiff to file a signed copy within twenty days. A signed copy was never submitted.

<sup>8</sup> Although the Board, in its order of February 22, 2000, deferred decision on defendant's motion to strike until final decision, the Board

Defendant's objection that the evidence was not disclosed during discovery is also not well taken. Defendant has not pointed to any specific discovery request that would have required the disclosure of this evidence. Therefore, defendant's motion to strike exhibits nos. 79-87 is denied.

We consider, next, plaintiff's request in its brief that the Board take judicial notice of two exhibits submitted with its brief. Exhibit A to the brief is a copy of a newspaper article and Exhibit B is an excerpt from an atlas. The newspaper article is inappropriate subject matter for judicial notice. Further, plaintiff's request is merely an attempt to introduce additional evidence outside of its testimony period. We have given exhibit A no consideration. While we do not condone plaintiff's attempt to supplement the record at this late stage, Exhibit B, a map of Ontario from the *Rand McNally Cosmopolitan World Atlas* (1987), is amenable to judicial notice and, thus, we take judicial notice thereof. We do not, however, separately take judicial notice of the distances between cities shown on that map.

Next, we consider various objections by plaintiff to defendant's evidence submitted as exhibits to testimony.

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noted therein that exhibits nos. 79, 85 and 86A, at least, are clearly

Plaintiff contends that defendant's exhibits nos. 8-10, 12 and 15 should be excluded as hearsay. Exhibit no. 8 is a third-party letter to defendant stating that the writer has received defendant's information package; exhibit no. 9 is a third-party letter to defendant stating that defendant has purchased airbag books and electrical repair manuals from the writer's company since September 1993; exhibit no. 10 is a third-party letter to defendant asking for an information packet regarding possible franchising; exhibit no. 12 is a third-party letter to defendant thanking defendant's Mr. Bunker for participation in a 1995 appraisers conference; and exhibit no. 15 is a third-party letter from a graphics and printing company stating that the company did printing for defendant. These exhibits would be hearsay only if they are considered for the truth of the statements contained therein.<sup>9</sup> To the extent that exhibit nos. 8-10, 12 and 15 are submitted to show that defendant had received these letters, the exhibits are acceptable and have been considered as part of the record.

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official records.

<sup>9</sup> Further, the statements contained therein do not attest to, and are not probative of, defendant's use of its mark in connection with the rendering of the services identified in defendant's application and registration.



Finally, plaintiff contends that defendant's exhibits nos. 10-14 and 16-26 should be excluded as irrelevant.<sup>10</sup> Because these exhibits pertain to matters in issue in this proceeding, we have considered them for whatever probative value they may have.

#### *The Record*

The record consists of the pleadings; the files of the involved application and registration; a U.S. Postal Service statement submitted by plaintiff's notice of reliance; and the testimony depositions, with accompanying exhibits, of defendant's witnesses, Bradley James Bunker and Joseph J. Pawlak, and of plaintiff's witness, Bruce Strain.<sup>11</sup> Both parties filed briefs on the case but a hearing was not requested.

#### *Analysis*

We consider, first, the issue of likelihood of confusion. In its brief (pg. 14), defendant makes the following statement with respect to the marks and services:

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<sup>10</sup> Plaintiff also argues that certain specified portions of its own witness's testimony, that of Mr. Strain, are admissible. However, defendant's brief contains no objections to Mr. Strain's testimony. Thus, we have not considered plaintiff's comments, although we have considered Mr. Strain's testimony.

<sup>11</sup> Plaintiff submitted Mr. Strain's testimony from its case in chief, with accompanying exhibits nos. 1-77, by notice of reliance. Use of a notice of reliance is unnecessary for the submission of testimony and

[Defendant] does not deny that its marks ... are confusingly similar to [plaintiff's] marks .... Furthermore, it is clear that both [defendant's and plaintiff's] respective marks are used in connection with substantially similar, if not identical, services.

We consider defendant's statement in its brief to be a concession that the parties' marks are substantially similar; that the parties' services of installing airbags and airbag sensors in automobiles in which the previous airbags have been deployed are substantially similar, if not identical; and that, thus, confusion as to source is likely if both parties use their respective marks in connection with these services.

Thus, the only issue before us, and the issue principally argued by the parties, is priority. We begin by reciting the pertinent facts of record about the airbag reinstallation business and plaintiff's and defendant's respective businesses in the United States.<sup>12</sup>

The evidence establishes that airbags became optional in 1987-model domestically-manufactured passenger cars; that, to comply with federal regulations, manufacturers put driver airbags in all passenger cars

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accompanying exhibits; and it is an inappropriate use of a notice of reliance.

<sup>12</sup> Defendant's evidence regarding its use of its mark in connection with services rendered in Canada is not relevant to our determination of use and priority in the United States.

manufactured after September 1, 1989; and that driver and front passenger airbags became mandatory in passenger cars manufactured after September 1, 1997, and in vans and light trucks manufactured after September 1, 1998.<sup>13</sup>

*The 1991 Mitchell Airbag Service and Repair Manual*

(Exhibit 82, testimony of Mr. Strain) includes entries for domestic passenger car model-years beginning in 1988 and imported passenger car model-years beginning in 1985. According to the testimony of Mr. Strain, prior to 1992, autobody shops did not have the specialized tools necessary to diagnose or test airbag systems, so all such testing and replacements were done by auto dealerships prior to 1992.

Mr. Strain testified that he registered SUPPLEMENTAL RESTRAINT SPECIALISTS as a fictitious name with the state of California on June 17, 1992; that, in 1992, plaintiff began using the marks SRS and SUPPLEMENTAL RESTRAINT SPECIALISTS and design in connection with its airbag diagnostic and installation business; and that, through 1993, plaintiff was also conducting a substantial amount of market research and distributing promotional materials

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<sup>13</sup> We take judicial notice of these facts contained in Exhibit 79 to Mr. Strain's testimony. Exhibit 79 is a December 1996 report to Congress by the National Highway Traffic Safety Administration entitled "Effectiveness of Occupant Protection Systems and Their Use."

to determine if its business would flourish and to ensure that its prices were competitive. In 1994 plaintiff began operating its airbag diagnostic and installation business at a profit.<sup>14</sup> Also in 1994, plaintiff began conducting workshops on airbag system diagnostics and installation to autobody shops and insurance company adjusters. In 1995 plaintiff began selling airbag system diagnostic tools. Plaintiff's business, including the sale of the above described services and products, has been continuous to the present.

Plaintiff's diagnostic and installation services have been offered only in California.<sup>15</sup> Plaintiff's

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<sup>14</sup> At p. 19 of Mr. Strain's October 14, 1998 testimony, he states that in 1992 plaintiff was rendering its described diagnostic and installation services under its marks. However, at p. 206 of the same deposition, Mr. Strain states that he "received [his] first payment for income toward the business" in 1994. From other statements made in proximity to these two statements, we conclude that plaintiff began offering and rendering its airbag diagnostic and installation services under its mark in 1992, but first realized a profit in 1994.

<sup>15</sup> Defendant argues, for the first time in its brief, that plaintiff has not offered its services outside of the state of California. Defendant appears to acknowledge plaintiff's priority of use in California and asks that defendant be granted registrations for all of the United States except California. This is not a concurrent use proceeding, and issues of concurrent use have not been tried or established. Therefore, we have given defendant's statements in this regard no consideration.

To the extent defendant is challenging plaintiff's standing by asserting that plaintiff's installation services have been rendered only in California, such an argument is not well taken. Plaintiff has shown that it is in the identical business as defendant and, thus, plaintiff has established its interest.

Finally, to the extent defendant is challenging plaintiff's priority by asserting that plaintiff's use of its mark must be on services rendered across state lines, this argument is also not well taken. The Trademark Act prohibits the registration of a mark which is

services are rendered to autobody shops; however, insurance company adjusters and/or managers consider and approve the estimates submitted by plaintiff to the autobody shop. The evidentiary record supports Mr. Strain's statements.

Additionally, the record includes copies of several articles about airbag reinstallation in nationally distributed publications for the autobody and insurance industry. The articles refer to plaintiff's services rendered under its mark. The evidence indicates, further, that plaintiff advertises its services identified by its mark in these publications; that its employees author articles in these publications; and that its employees participate in workshops and conferences regarding the diagnosis and reinstallation of airbags offered by insurance companies and professional organizations in this field.

Defendant's principal witness was Mr. Bunker, defendant's president, who testified that defendant has been in business installing airbags in Canada since 1989. Mr. Bunker stated that defendant has been advertising its services in the United States since 1989; and that

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likely to cause confusion with a mark previously used in the United States; there is no requirement that such use be in interstate commerce.

defendant has performed services in the United States for body shops referred to defendant by U.S. insurance companies. However, Mr. Bunker was very vague about the first date of use, and nature, of the services performed in the United States; and he was vague regarding any services performed in the United States up to the present. Furthermore, defendant has submitted no documentary evidence to support Mr. Bunker's statements regarding use of the mark in the United States.<sup>16</sup>

Defendant's deposition of Mr. Pawlak, a De Witt, New York, field supervisor with Kemper Insurance Company, attests only to his having been contacted by Mr. Bunker in 1992 and 1998; and Mr. Pawlak confirms that he did not purchase any goods or services from Mr. Bunker or defendant. Exhibits to Mr. Bunker's testimony include defendant's file copies of promotional letters to third parties and letters from third parties acknowledging receipt of promotional/informational materials. However, this is not evidence that actual sales have taken place in the United States. Similarly, evidence indicating printing purchases and seminars and services rendered in

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<sup>16</sup> Mr. Bunker stated that defendant maintains records for only a period of five years; however, defendant has produced no invoices or other evidence of use of its mark in connection with services rendered in the United States during the five years preceding the testimony period, the period for which defendant allegedly keeps records.

Canada do not establish defendant's use of its mark in connection with services rendered in the United States.

Thus, we find that defendant has not established use of its marks in the United States on this record.

Defendant's priority filing date of its opposed application (July 12, 1995) is the only date upon which defendant may rely for establishing priority in the opposition. In the cancellation, it is clear that a Supplemental Register registration is incompetent as evidence to establish priority of use of defendant's mark; the Supplemental registration is evidence of nothing more than the fact that the registration issued on the date printed thereon. It is entitled to no presumptions of validity, ownership, use or priority. See *Andrea Radio Corporation v. Premium Import Co., Inc.*, 191 USPQ 232 (TTAB 1975); *Nabisco, Inc. v. George Weston Limited*, 179 USPQ 503 (TTAB 1973); *Aloe Crème Laboratories, Inc. v. Bonne Bell, Inc.*, 169 USPQ 246 (TTAB 1970); and *Nautalloy Products, Inc. v. Danielson Manufacturing Company*, 130 USPQ 364 (TTAB 1961).

While the actual date of first use of plaintiff's marks is not entirely clear from Mr. Strain's testimony, the body of evidence of record establishes that plaintiff

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first used its mark in connection with its airbag  
reinstallation services in 1992.

Thus, we conclude that plaintiff has established its  
priority of use of its pleaded marks in connection with  
its services with respect to both defendant's mark in its  
pending application and its mark in its Supplemental  
Register registration; and that there exists a likelihood  
of confusion with respect to the parties' marks and  
identical services.

*Decision:* The opposition is sustained and the  
petition to cancel is granted. Defendant's registration  
will be cancelled in due course.